Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced “Casey”

Supplement With New, Revised, and Revoked Instructions

As approved at the
June 25, 2010, Judicial Council Meeting

Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. H. Walter Croskey, Chair

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Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

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June 2010

This supplement to the 2010 Edition of CACI includes all of the new, revised, and revoked California Civil Jury Instructions approved by the Judicial Council of California at its meeting of June 25, 2010.

BREACH OF FIDUCIARY DUTY

CACI No. 4102. Duty of Undivided Loyalty—Essential Factual Elements (*Revised*)

UNLAWFUL DETAINER

CACI No. 4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements (*Revised*)

CACI No. 4320. Affirmative Defense—Implied Warranty of Habitability (*Revised*)

CACI No. 4321. Affirmative Defense—Retaliatory Eviction—Tenant's Complaint (Civ. Code, § 1942.5) (*Revised*)

CACI No. 4324. Affirmative Defense—Waiver by Acceptance of Rent (*Revised*)

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101. Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. I will begin by identifying the parties to the case. [*Name of plaintiff***] filed this lawsuit. [He/She/It] is called a plaintiff. [He/She/It] seeks damages [or other relief] from [***name of defendant***], who is called a defendant.**

[[*Name of plaintiff***] claims [***insert description of the plaintiff's claim(s)***]. [***Name of defendant***] denies those claims. [[***Name of defendant***] also contends that [***insert description of the defendant's affirmative defense(s)***].]]**

[[*Name of cross-complainant***] has also filed what is called a cross complaint against [***name of cross-defendant***]. [***Name of cross-complainant***] is the defendant, but also is called the cross-complainant. [***Name of cross-defendant***] is called a cross-defendant.]**

[In [his/her/its] cross-complaint, [*name of cross-complainant***] claims [***insert description of the cross-complainant's claim(s)***]. [***Name of cross-defendant***] denies those claims. [[***Name of cross-defendant***] also contends that [***insert description of the cross-defendant's affirmative defense(s) to the cross-complaint***].]]**

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence.

Next, the jury will hear the evidence. [*Name of plaintiff***] will present evidence first. When [***name of plaintiff***] is finished, [***name of defendant***] will have an opportunity to present evidence. [Then [***name of cross-complainant***] will present evidence. Finally, [***name of cross-defendant***] will present evidence.]**

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called

exhibits. Exhibits are given a [number/letter] so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

There are many rules that govern whether something will be admitted into evidence. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

New September 2003; Revised February 2007, June 2010

Directions for Use

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with CACI No. 100, *Preliminary Admonitions*.

The bracketed second, third, and fourth paragraphs are optional. The court may wish to use these paragraphs to provide the jurors with an explanation of the claims and defenses that are at issue in the case. Include the third and fourth paragraphs if a cross-complaint is also being tried. Include the last sentence in the second and fourth paragraphs if affirmative defenses are asserted on the complaint or cross-complaint.

The sixth paragraph presents the order of proof. If there is a cross-complaint, include the last two sentences. Alternatively, the parties may stipulate to a different order of proof—for example, by agreeing that some evidence will apply to both the complaint and the cross-complaint. In this case, customize this paragraph to correspond to the stipulation.

Sources and Authority

- Rule 2.1035 of the California Rules of Court provides: "Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in rule 2.1033 if questions are

allowed, and the legal principles that will govern the proceeding."

- "[W]e can understand that it might not have *seemed* like [cross-complainants] were producing much evidence on their cross-complaint at trial. Most of the relevant (and undisputed) facts bearing on the legal question of whether [cross-defendants] had a fiduciary duty and, if so, violated it, had been brought out in plaintiffs' case-in-chief. But just because the undisputed evidence favoring the cross-complaint also happened to come out on *plaintiffs'* case-in-chief does not mean it was not available to support the cross-complaint." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1207 [103 Cal.Rptr.3d 606], original italics.)
- Code of Civil Procedure section 607 provides:

  When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

  1. The plaintiff may state the issue and his case;
  2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
  3. The plaintiff must then produce the evidence on his part;
  4. The defendant may then open his defense, if he has not done so previously;
  5. The defendant may then produce the evidence on his part;
  6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
  7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
  8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
  9. The court may then charge the jury.

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 147

Wagner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group) ¶¶ 1:427–1:432; 4:460–4:463

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010

The committee wishes to express its thanks to Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa, for his assistance in the drafting of this instruction.

Sources and Authority

- Standard 10.20(a)(2) of the California Standards of Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."
- Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or

socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

204. Willful Suppression of Evidence

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

New September 2003; Revised October 2004

Directions for Use

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585 [182 P. 285]; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051 [213 Cal.Rptr. 69]; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598 [47 Cal.Rptr. 109].)

If there is evidence that a party improperly altered evidence (as opposed to concealing or destroying it), users should consider modifying this instruction to account for that circumstance.

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 [74 Cal.Rptr.2d 248, 954 P.2d 511], a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, "including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."

Sources and Authority

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."
- Former Code of Civil Procedure section 1963(5) permitted the jury to infer "[t]hat the evidence willfully suppressed would be adverse if produced." Including this inference in a jury instruction on willful suppression is proper because "Evidence Code section 413 was not intended as a change in the law." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994 [16 Cal.Rptr.2d 787], disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)

- "The rule of [present Evidence Code section 413] . . . is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. *A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse*." (*Williamson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d 829, 836 fn. 2 [148 Cal.Rptr. 39, 582 P.2d 126], original italics.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 115

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93 (Matthew Bender)

450. Good Samaritan

Revoked June 2010

Legislation amending Health and Safety Code section 1799.102 was enacted in August 2009 in response to the California Supreme Court's decision in *Van Horn v. Watson* (2008) 45 Cal.4th 322, which construed that statute to apply only to immunize good samaritans who provide medical care at the scene of a medical emergency. Because CACI No. 450, as currently written, does not comport with the specific language of the revised statute and the cited authorities no longer apply, the current instruction must be revoked. A replacement instruction will be considered in the next CACI release cycle.

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [***name of defendant***] did or said something that caused [***name of plaintiff***] to delay filing the lawsuit. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] said or did something that caused [***name of plaintiff***] to believe that it would not be necessary to file a lawsuit;**
2. **That [***name of plaintiff***] relied on [***name of defendant***]'s conduct and therefore did not file the lawsuit within the time otherwise required;**
3. **That a reasonable person in [***name of plaintiff***]'s position would have relied on [***name of defendant***]'s conduct;**
4. **That after the limitation period had expired, [***name of defendant***]'s representations by words or conduct proved to not be true; and**
5. **That [***name of plaintiff***] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

It is not necessary that [*name of defendant***] have acted in bad faith or intended to mislead [***name of plaintiff***].**

New October 2008

Directions for Use

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)
- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)
- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. . . . To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. . . . Where the delay in commencing action is induced by the conduct of the defendant it

cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)
- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)
- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of

limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)
- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)
- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)
- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)
- "A nondisclosure is a cause of injury if the plaintiff would have acted so

as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 523–536

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) § 5:111.6

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

504. Standard of Care for Nurses

[A/An] [*insert type of nurse***] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of nurses***] would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of nurses***] would use in similar circumstances based only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

New September 2003; Revised October 2004, June 2010

Directions for Use

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner.

The second paragraph should be included unless the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

- "[A] nurse is negligent if he or she fails to meet the standard of care—that is, fails to use the level of skill, knowledge, and care that a reasonably careful nurse would use in similar circumstances." (Massey v. Mercy Med. Ctr. Redding (2009) 180 Cal.App.4th 690, 694 [103 Cal.Rptr.3d 209 [citing this instruction]].)
- " '[T]oday's nurses are held to strict professional standards of knowledge and performance.' But '[s]ome difficulties are presented [in the nursing malpractice context] by the fact that a nurse's traditional role has involved "both routine, nontechnical tasks as well as specialized nursing tasks. If, in considering the case law in this area, the dispute is analyzed in terms of what action by the nurse is being complained about, it is possible to make some sense out of the relevant decisions." ' " (*Massey, supra*, 180 Cal.App.4th at p. 697, internal citation omitted.)
- Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)

- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150 [211 Cal.Rptr. 368, 695 P.2d 665].) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238 [288 P.2d 581].)
- "[E]xpert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, 'except in cases where the negligence is obvious to laymen.' " (*Massey, supra*, 180 Cal.App.4th at pp. 694–695.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 995–997

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.52

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

606. Legal Malpractice Causing Criminal Conviction—Actual Innocence

[*Name of plaintiff*] alleges that [*name of defendant*] was negligent in defending [him/her] in a criminal case, and as a result, [he/she] was wrongly convicted. To establish this claim, [*name of plaintiff*] must first prove that [he/she] was actually innocent of the charges for which [he/she] was convicted.

New April 2009

Directions for Use

Give this instruction after CACI No. 400, *Essential Factual Elements,* and CACI No. 600, *Standard of Care,* in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670].) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges; for example, by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra,* 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence; for example, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

Sources and Authority

- Code of Civil Procedure section 340.6(a) provides in part: "If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case."
- "In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and

exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence." (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779], internal citations omitted.)

- "If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties." *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543 [79 Cal.Rptr.2d 672, 966 P.2d 983].)
- "The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff 'to convince the civil jurors of his innocence.' Thus, the determination of actual innocence is rooted in the goal of reliable factfinding." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764–765 [31 Cal.Rptr.3d 831], internal citations omitted.)
- "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. . . . [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action." (*Coscia, supra,* 25 Cal.4th at p. 1201.)
- "[A] plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel." (*Coscia, supra,* 25 Cal.4th at p. 1205.)
- "[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on the greater offense." (*Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640].)

- "[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration." (*Wilkinson, supra,* 167 Cal.App.4th at p. 48.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1997) Attorneys, § 315

Vapnek et al., California Practice Guide: Professional Responsibility (The Rutter Group) ¶¶ 6:935–6:944

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.10, 76.381 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.32 (Matthew Bender)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/it] did not sustain actual injury until on or after [*insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date

on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Code of Civil Procedure section 340.6 provides:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the

future, the period of limitations provided for by this section shall commence to run upon the occurrence of that act or event.

- Code of Civil Procedure section 352 provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

  (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594,

904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues

representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [his/her/its] alleged wrongful act or omission occurred before [***insert date four years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

> **[***Choose one or more of the following four options:***]**
>
> **[that [he/she/it] did not sustain actual injury until on or after [***insert date four years before date of filing***]][,/; or]]**
>
> **[that on or after [***insert date four years before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred [,/; or]]**
>
> **[that on or after [***insert date four years before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission [,/; or]]**
>
> **[that on or after [***insert date four years before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] knowingly concealed the facts***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies;

and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

Sources and Authority

- Code of Civil Procedure section 340.6 provides:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her claim, the action shall be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section

shall commence to run upon the occurrence of that act or event.

- Code of Civil Procedure section 352 provides:

  (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

  (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's

subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant***] used reasonable care, you may consider, among other factors, the following:**

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s).***]**

New September 2003; Revised June 2010

Directions for Use

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [143 P.2d 929].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)
- A landowner owes a duty to exercise reasonable care to maintain his or her property in such a manner as to avoid exposing others to an unreasonable risk of injury. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 [60 Cal.Rptr.2d 448, 929 P.2d 1239]; *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515 [6 Cal.Rptr.2d 810].) The failure to fulfill the duty is negligence. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371–372 [178 Cal.Rptr. 783, 636 P.2d 1121].) The existence of a duty of care is an issue of law for the court. (*Alcaraz, supra*, 14 Cal.4th at p. 1162, fn. 4.)
- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)
- "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)
- A visitor's status on the property—as a trespasser, a licensee, or an invitee—no longer establishes the extent of the owner's duties to the visitor, although status may be relevant to the specific nature or scope of those duties or to the foreseeability that the visitor might be harmed. (*Ann M., supra*, 6 Cal.4th at pp. 674–675.)
- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally

abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id*., at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486–487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher, supra,* 30 Cal.3d at p. 371.)
- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra,* 30 Cal.3d at p. 372.)
- "A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478–1479 [84 Cal.Rptr.2d 634], internal citations omitted.)
- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra,* 23 Cal.2d at p. 260.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1086

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.03, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.11 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 16:3

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Essential Factual Elements*, CACI No. 1001, *Basic Duty of Care*, and CACI No. 1003, *Unsafe Conditions*, if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability

for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises . . . cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)
- "Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [¶] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to

those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)
- "[W]here a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." [¶] Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)
- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably

toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669], internal citations omitted.)

- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)
- "It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]'s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)
- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)
- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway

where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.01–421.121 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 16:12–16:16

1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [[*name of plaintiff***]/ [or] [***name of third party***]] exercised or failed to exercise reasonable care in [his/her] use of the property.]**

New September 2003; Revised June 2010

Directions for Use

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- Government Code section 830(a) provides: " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."
- The Government Code permits the court to decide this issue as a matter of law. Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."
- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be

resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)
- "The negligence of a plaintiff-user of public property . . . is a defense which may be asserted by a public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra,* 187 Cal.App.3d at p. 131, internal citation omitted.)
- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra,* 187 Cal.App.3d at p. 132, internal citation omitted.)
- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372, internal citations omitted.)
- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial

risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition . . ., does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "The majority of cases . . . have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable. . . . Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra,* 36 Cal.3d at pp. 810–811, internal citations omitted.)
- "Two points applicable to this case are . . . well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 269

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1123. Loss of Design Immunity (*Cornette*)

[*Name of defendant***] is not responsible for harm caused to [***name of plaintiff***] based on the plan or design of the [***insert type of property, e.g., "highway"***] unless [***name of plaintiff***] proves the following:**

1. **That the [***insert type of property, e.g., "highway"***]'s plan[s] or design[s] had become dangerous because of a change in physical conditions;**
2. **That [***name of defendant***] had notice of the dangerous condition created because of the change in physical conditions; and**
3. **[That [***name of defendant***] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;]**

   [or]

   [That [*name of defendant***] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]**

New September 2003; Revised June 2010

Directions for Use

Give this instruction if the public entity defendant is entitled to design immunity unless the changed-conditions exception can be established. Read either or both options for element 3 depending on the facts of the case.

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67; see Gov. Code, § 830.6.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Cornette*, *supra*, 26 Cal.4th at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178

Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) But, as a practical matter, these elements are usually stipulated to or otherwise established so they seldom become issues for the jury.

Users should include CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice,* to define "notice" and "dangerous condition" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- Government Code section 830.6 provides, in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."
- "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette, supra,* 26 Cal.4th at p. 66, internal citations omitted.)
- "The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette, supra,*

26 Cal.4th at p. 69, internal citation omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66–67.)

Secondary Sources

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees,* § 61.03[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.85 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

VF-1101. Dangerous Condition of Public Property—Affirmative Defense—Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] own [or control] the property?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was the property in a dangerous condition at the time of the incident?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?**

   _____ Yes _____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **[Did negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of his or her employment create the dangerous condition?]**

   _____ Yes _____ No

   [or]

   [Did [*name of defendant***] have notice of the dangerous condition for a long enough time to have protected against it?]**

   _____ Yes _____ No

   If your answer to [either option for] question 4 is yes, then answer question 5. If you answered no [to both options],

stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Was the dangerous condition a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **[Answer if you answered yes to the first option for question 4: When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [***name of defendant***]'s [act/***specify failure to act***] that created the dangerous condition reasonable under the circumstances?]**

_____ Yes _____ No

[or]

[Answer if you answered yes to the second option for question 4: When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant***] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [***name of defendant***]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]**

_____ Yes _____ No

If your answer to [either option for] question 6 is no, then answer question 7. If you answered yes [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2008, October 2008, June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*, CACI No. 1111, *Affirmative Defense—Condition Created by Reasonable Act or Omission*, and CACI No. 1112, *Affirmative Defense—Reasonable Act or Omission to Correct*.

For questions 4 and 6, choose the first bracketed options if liability is alleged

because of an employee's negligent conduct under Government Code section 835(a). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Government Code section 835(b). Both options may be given if the plaintiff is proceeding under both theories of liability.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**
2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];**
3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger to users of the [***product***];**
4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**
5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**
6. **That [***name of plaintiff***] was harmed while using the [***product***] in a reasonably foreseeable way; and**
7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

New September 2003; Revised April 2009, December 2009

Directions for Use

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable

in light of the generally recognized and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252].)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." . . .' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co.*, Inc. (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)
- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)
- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case

requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. . . . [¶] [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002–1003 [281 Cal.Rptr. 528, 810 P.2d 549].)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. . . . [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)
- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)
- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)
- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)
- ". . . California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn . . . ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)
- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)
- Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)
- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)
- "In most cases, . . . the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)
- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)
- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)
- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' . . . [T]he manufacturer must continue to

provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine, supra,* 68 Cal.App.4th at p. 1482.)

- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467–1479

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

1222. Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent by not using reasonable care to warn [or instruct] about the [***product***]'s dangerous condition or about facts that make the [***product***] likely to be dangerous. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**
2. **That [***name of defendant***] knew or reasonably should have known that the [***product***] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;**
3. **That [***name of defendant***] knew or reasonably should have known that users would not realize the danger;**
4. **That [***name of defendant***] failed to adequately warn of the danger [or instruct on the safe use of the [***product***]];**
5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [***product***]];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s failure to warn [or instruct] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks or side effects that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

New September 2003

Directions for Use

The last bracketed paragraph is to be used in prescription drug cases only.

Sources and Authority

- A manufacturer "has a duty to use reasonable care to give warning of the

dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)
- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549].)
- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. . . . [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)
- Restatement Second of Torts section 388 provides:

  One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its

probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

- Restatement Second of Torts section 394 provides: "The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge."
- These sections have been cited with approval by California courts. (See *Putensen, supra,* 12 Cal.App.3d at p. 1077 and cases cited therein.)
- There is no duty to warn of obvious defects. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 966 [257 Cal.Rptr. 610]; *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 [183 Cal.Rptr. 777]; *Morris v. Toy Box* (1962) 204 Cal.App.2d 468, 471 [22 Cal.Rptr. 572].)
- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)
- The duty of a manufacturer to warn about the potential hazards of its product, even when that product is only a component of an item manufactured or assembled by a third party, has been recognized, but is limited. (See *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359]; *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, 190.165 et seq. (Matthew Bender)

1240. Affirmative Defense to Express Warranty—Not "Basis of Bargain"

Revoked June 2010

See *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal App 4th 1213, 1234.

1244. Affirmative Defense—Sophisticated User

[*Name of defendant*] claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] based on a failure to warn because [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense, [*name of defendant*] must prove that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger.

New October 2008

Directions for Use

Give this instruction as a defense to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements,* or CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements.*

Sources and Authority

- "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905].)
- "The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson*, *supra*, 43 Cal.4th at p. 65, internal citation omitted.)
- "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's

employees or downstream purchasers.' This is because the user's knowledge of the dangers is the equivalent of prior notice." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citations omitted.)

- "[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson, supra,* 43 Cal.4th at pp. 65–66, internal citations omitted.)
- "[A] manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute." (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 556 [101 Cal.Rptr.3d 726].)
- "The sophisticated user defense concerns warnings. Sophisticated users 'are charged with knowing the particular product's dangers.' 'The rationale supporting the defense is that "the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers." [Citation.]' [¶] [Plaintiff]'s design defect cause of action was not concerned with warnings. Instead, he alleged that respondents' design of their refrigerant was defective. We see no logical reason why a defense that is based on the need for warning should apply." (*Johnson, supra,* 179 Cal.App.4th at p. 559, internal citations omitted.)
- "The relevant time for determining user sophistication for purposes of this exception to a manufacturer's duty to warn is when the sophisticated user is injured and knew or should have known of the risk." (*Johnson, supra,* 43 Cal.4th at p. 73.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541–1542

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability,* § 460.185 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.246 (Matthew Bender)

1246. Affirmative Defense—Design Defect—Government Contractor

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[*Name of defendant***] may not be held liable for design defects in the [***product***] if it proves all of the following:**

1. **That [***name of defendant***] contracted with the United States government to provide the [***product***] for military use;**
2. **That the United States approved reasonably precise specifications for the [***product***];**
3. **That the [***product***] conformed to those specifications; and**
4. **That [***name of defendant***] warned the United States about the dangers in the use of the [***product***] that were known to [***name of defendant***] but not to the United States.**

New June 2010

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].) It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. There would appear to be no policy reason why this defense should be limited to military contracts.

Different standards and elements apply in a failure-to-warn case. This instruction must be modified for use in such a case. (See *Oxford, supra*, 177 Cal.App.4th at p. 712; *Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586.)

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal

procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra*, 177 Cal.App.4th at p. 708, quoting *Boyle, supra*, 487 U.S. at pp. 500, 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra*, 487 U.S. at pp. 512–513.)
- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)
- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214].)
- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for

the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. . . . [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra*, 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra*, 177 Cal.App.4th at p. 711.)
- "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, *Boyle* commands that we defer to the operation of state law." (*Butler, supra*, 89 F.3d at p. 586.)
- "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1156–1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford, supra*, 177 Cal.App.4th at p. 712.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1538

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought a lawsuit against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

4. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)
- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."
- "To establish a cause of action for the malicious prosecution of a civil

proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)
- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)
- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. (See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] [litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"]; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ["only exception . . . has been for malicious prosecution actions"]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ["privilege applies only to tort causes of action, and not to the tort of malicious prosecution"].)
- A person who had no part in the commencement of the action but who participated in it at a later time may be held liable for malicious prosecution: "There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 264 [138 Cal.Rptr. 654].)
- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate . . . that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982), 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)
- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)
- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)
- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. . . .' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)
- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Found., supra,* 72 Cal.App.4th at p. 1153, internal citation omitted.)
- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)
- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter

circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver, supra,* 95 Cal.App.3d at p. 185, original italics, internal citations omitted.)
- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established . . . ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)
- " 'Probable cause exists when a cause of action is, objectively speaking, legally tenable.' . . . The claim need not be meritorious in fact, but only ' "arguably tenable . . . ." ' " (*Drummond, supra,* 176 Cal.App.4th at p. 453, original italics, internal citations omitted.)
- In *Bertero,* the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra,* 13 Cal.3d at pp. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)
- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury . . . . [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such

facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)
- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)
- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)
- "Probable cause may be present even where a suit lacks merit. . . . Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408].)
- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)
- "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 383.)
- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by

hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)

- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)
- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)
- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)
- "Suits with the hallmark of an improper purpose are those in which: ' ". . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' " (*Sierra Club Found., supra,* 72 Cal.App.4th at pp. 1156–1157.)
- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra,* 182 Cal.App.4th at p. 226.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471, 474, 477–484, 486–512

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process,* §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1621. Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of injury victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of injury victim***];**
2. **That [***name of plaintiff***] was present at the scene of the injury when it occurred and was aware that [***name of injury victim***] was being injured;**
3. **That [***name of plaintiff***] suffered serious emotional distress; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s serious emotional distress.**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003

Directions for Use

This instruction is for use in bystander cases, where a plaintiff seeks recovery for damages suffered as a percipient witness of injury to others. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements.*

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

In element 2, the phrase "was being injured" is intended to reflect contemporaneous awareness of injury.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Sources and Authority

- A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though he or she did not fear imminent physical harm. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 746–747 [69 Cal.Rptr. 72, 441 P.2d 912].)
- "As an introductory note, we observe that plaintiffs . . . framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort . . . .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)
- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)
- The close relationship required between the plaintiff and the injury victim does not include the relationship found between unmarried cohabitants. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr.254, 758 P.2d 582].)
- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927–928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress,* § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress,* § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress,* §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

1800. Intrusion Into Private Affairs

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [***specify place or other circumstance***];**
2. **That [***name of defendant***] intentionally intruded in [***specify place or other circumstance***];**
3. **That [***name of defendant***]'s intrusion would be highly offensive to a reasonable person;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether [*name of plaintiff***] had a reasonable expectation of privacy in [***specify place or other circumstance***], you should consider, among other factors, the following:**

(a) The identity of [*name of defendant***];**

(b) The extent to which other persons had access to [*specify place or other circumstance***] and could see or hear [***name of plaintiff***]; and**

(c) The means by which the intrusion occurred.

In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:

(a) The extent of the intrusion;

(b) [*Name of defendant***]'s motives and goals; and**

(c) The setting in which the intrusion occurred.

New September 2003; Revised June 2010

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Sources and Authority

- "Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness . . . .Prosser's classification was adopted by the Restatement Second of Torts in sections 652A-652E. California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633].)
- The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citation omitted.)
- The right of privacy was first recognized in California in the case of *Melvin v. Reid* (1931) 112 Cal.App. 285, 291 [297 P. 91]. The court found a legal foundation for the tort in the right to pursue and obtain happiness found in article 1, section 1 of the California Constitution.
- "The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection 'are not unrelated' under California law. (*Shulman, supra*, 18 Cal.4th 200, 227; accord, *Hill, supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal.Rptr.2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].)" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286 [97 Cal.Rptr.3d 274, 211 P.3d 1063].)
- "[W]e will assess the parties' claims and the undisputed evidence under the rubric of both the common law and constitutional tests for establishing a privacy violation. Borrowing certain shorthand language from *Hill, supra*, 7 Cal.4th 1, which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant

interests." (*Hernandez, supra*, 47 Cal.4th at p. 288.)

- The element of intrusion "is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914–915 [85 Cal.Rptr.2d 909, 978 P.2d 67], internal citations omitted.)
- "As to the first element of the common law tort, the defendant must have 'penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be 'objectively reasonable.' In *Sanders* [*supra*, at p. 907] . . . , this court linked the reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred." (*Hernandez, supra*, 47 Cal.4th at pp. 286–287.)
- The plaintiff does not have to prove that he or she had a "complete expectation of privacy": "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra*, 20 Cal.4th at pp. 917–918.)
- "The second common law element essentially involves a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ["offensiveness"]; each case must be taken on its facts.' " (*Hernandez, supra*, 47 Cal. 4th at p. 287, internal citations omitted.)
- "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion. . . . A court determining the existence of 'offensiveness' would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d

1463, 1483–1484 [232 Cal.Rptr. 668].)

- "Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.' " (*Hernandez, supra*, 47 Cal.4th at p. 295, internal citation omitted.)
- "[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder." (*Sanders, supra*, 20 Cal.4th at p. 911, internal citations omitted.)
- Damages flowing from an invasion of privacy "logically would include an award for mental suffering and anguish." (*Miller, supra*, 187 Cal.App.3d at p. 1484, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194].)
- Related statutory actions can be brought for stalking (Civ. Code, § 1708.7), invasion of privacy to capture physical impression (Civ. Code, § 1708.8), and eavesdropping and wiretapping (Pen. Code, § 637.2). Civil Code section 1708.8 was enacted in 1998 as an anti-paparazzi measure. To date there are no reported cases based on this statute.

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 651, 652, 656–659

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1704

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.02 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.30 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:8

1801. Public Disclosure of Private Facts

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized private information concerning [***name of plaintiff***];**
2. **That a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**
3. **That [***name of defendant***] knew, or acted with reckless disregard of the fact, that a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**
4. **That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether the information was a matter of legitimate public concern, you should consider, among other factors, the following:

(a) The social value of the information;

(b) The extent of the intrusion into [*name of plaintiff***]'s privacy; [and]**

(c) Whether [*name of plaintiff***] consented to the publicity explicitly or by voluntarily seeking public attention or a public office; [and]**

(d) [*Insert other applicable factor***].**

[In deciding whether [*name of defendant***] publicized the information, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become**

public knowledge.]

New September 2003

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

- "[T]he allegations involve a public disclosure of private facts. The elements of this tort are ' "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." ' The absence of any one of these elements is a complete bar to liability." (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129–1130 [91 Cal.Rptr.3d 858], internal citations omitted.)
- Restatement Second of Torts, section 652D provides:

  > One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
  >
  > (a) would be highly offensive to a reasonable person, and
  >
  > (b) is not of legitimate concern to the public.

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 131 [188 Cal.Rptr. 762], internal citations omitted.) However, "matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132.)

- Because of the right to freedom of speech, the Supreme Court has stated: "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542–543 [93 Cal.Rptr. 866, 483 P.2d 34].)
- In *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370], the court observed: "If a jury finds that a publication discloses private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement."
- "*Diaz* . . . expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. . . . We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citations omitted.)
- "In the matter before us, however, there is no indication that any issue of public interest or freedom of the press was involved. ' "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." ' Put another way, morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection. [Citations.]' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 874 [104 Cal.Rptr.3d 352], internal citation omitted.)
- "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged." (*Briscoe, supra*, 4 Cal.3d at p. 535, fn. 5.)
- Courts have devised a three-part test for evaluating newsworthiness: " '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.' " (*Briscoe, supra*, 4 Cal.3d at p. 541, internal citations omitted.)
- "[T]he right of privacy is purely personal. It cannot be asserted by

anyone other than the person whose privacy has been invaded." (*Moreno, supra*, 172 Cal.App.4th at p. 1131.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 664–667

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.03 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.32 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 20:1–20:2

1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

[*Name of defendant***] claims that [he/she] has not violated [***name of plaintiff***]'s right of privacy because the [***insert type of work, e.g., "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g., "picture"***] adds something new to [***name of plaintiff***]'s likeness, giving it a new expression, meaning, or message; or**
2. **That the value of the [***insert type of work, e.g., "picture"***] does not result primarily from [***name of plaintiff***]'s fame.**

New September 2003; Revised October 2008

Directions for Use

This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

Sources and Authority

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)
- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891–892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)
- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we

follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)
- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)
- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)
- "This 'transformative use' defense poses 'what is essentially a balancing test between the First Amendment and the right of publicity.' " (*Hilton v. Hallmark Cards* (9th Cir. 2009) 580 F.3d 874, 889.)
- "The application of the defense, which the California Supreme Court based loosely on the intersection of the First Amendment and copyright liability, depends upon 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.' In other words, '[w]e ask . . . whether a product containing a celebrity's likeness is so transformed that it has become

primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.' '[U]nder [this] test,' yet another formulation cautions, 'when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity.' " (*Hilton, supra*, 580 F.3d at p. 889, footnote and internal citations omitted.)

- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

1807. Affirmative Defense—Invasion of Privacy Justified

[*Name of defendant***] claims that even if [***name of plaintiff***] has proven all of the above, [his/her/its] conduct was justified. [***Name of defendant***] must prove that the circumstances justified the invasion of privacy because the invasion of privacy substantially furthered [***insert relevant legitimate or compelling competing interest***].**

If [*name of defendant***] proves that [his/her/its] conduct was justified, then you must find for [***name of defendant***] unless [***name of plaintiff***] proves that there was a practical, effective, and less invasive method of achieving [***name of defendant***]'s purpose.**

New September 2003; Revised October 2008, June 2010

Sources and Authority

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834, 865 P.2d 633].)
- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra,* 7 Cal.4th at p. 40.)
- "*Hill* and its progeny further provide that no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function—and except in the rare case in which a 'fundamental' right of personal autonomy is involved—the defendant need not present a ' "compelling" ' countervailing interest; only 'general balancing tests are

employed.' To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 [97 Cal.Rptr.3d 274, 211 P.3d 1063], internal citations omitted.)

- Note that whether the countervailing interest needs to be "compelling" or "legitimate" depends on the status of the defendant. "In general, where the privacy violation is alleged against a private entity, the defendant is not required to establish a 'compelling interest' but, rather, one that is 'legitimate' or 'important.' " (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440 [57 Cal.Rptr.2d 46].)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 575–603

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 20:18–20:20

1901. Concealment

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] concealed certain information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. (a) That [*name of defendant***] and [***name of plaintiff***] were [***insert type of fiduciary relationship, e.g., "business partners"***]; and**

(b) That [*name of defendant***] intentionally failed to disclose an important fact to [***name of plaintiff***];]**

[or]

[1. That [*name of defendant***] disclosed some facts to [***name of plaintiff***] but intentionally failed to disclose [other/another] important fact(s), making the disclosure deceptive;]**

[or]

[1. That [*name of defendant***] intentionally failed to disclose an important fact that was known only to [him/her/it] and that [***name of plaintiff***] could not have discovered;]**

[or]

[1. That [*name of defendant***] actively concealed an important fact from [***name of plaintiff***] or prevented [him/her/it] from discovering that fact;]**

2. That [*name of plaintiff***] did not know of the concealed fact;**

3. That [*name of defendant***] intended to deceive [***name of plaintiff***] by concealing the fact;**

4. That [*name of plaintiff***] reasonably relied on [***name of defendant***]'s deception;**

5. That [*name of plaintiff***] was harmed; and**

6. That [*name of defendant***]'s concealment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2004

Directions for Use

Under the second, third, and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed. Regarding the fourth bracketed instruction, the parties may wish to research whether active concealment alone is sufficient to support a cause of action for fraud in tort or whether it is merely grounds for voiding a contract under Civil Code section 1572. (See *Williams v. Graham* (1948) 83 Cal.App.2d 649, 652 [189 P.2d 324].)

Element 2 may be deleted if the third alternative bracketed instruction under element 1 is used.

Sources and Authority

- Civil Code section 1710 specifies four kinds of deceit. This instruction is derived from the third kind:

  A deceit, within the meaning of [section 1709], is either:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;
  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
  4. A promise, made without any intention of performing it.

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613 [7 Cal.Rptr.2d 859].)
- "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive

knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. . . . Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. . . . [¶] . . . [S]uch a relationship can only come into being as a result of some sort of transaction between the parties. . . . Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336–337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)

- "Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose . . . [however,] '[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225], internal citations omitted.)
- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996], footnotes omitted.)
- "[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)

- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)
- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc., supra,* 6 Cal.App.4th at p. 613, internal citation omitted.)
- "Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 793–799

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[2][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.26 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.70 et seq. (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 22:16

VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a false representation of an important fact to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of defendant***] honestly believe that the representation was true when [he/she] made it?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. **Did [***name of defendant***] have reasonable grounds for believing the representation was true when [he/she] made it?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] intend that [***name of plaintiff***] rely on the representation?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of plaintiff***] reasonably rely on the representation?**

   _____ **Yes** _____ **No**

   If your answer to question 5 is yes, then answer question 6.

If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Was [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **What are [***name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1903, *Negligent Misrepresentation.*

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation,* be kept separate and presented in the alternative.

With respect to the same misrepresentation, question 3 above cannot be answered "no" and question 2 of VF-1900 cannot also be answered "yes." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see CACI No. VF-1900, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

2003. Treble Damages—Timber

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was intentional and despicable.

To establish this claim, [*name of plaintiff*] must prove that [*name of defendant*] intended to harm [him/her/it] and acted willfully or maliciously with the intent to vex, harass, or annoy.

New September 2003

Directions for Use

Read this instruction only if plaintiff is seeking treble damages. The judge should ensure that this finding is noted on the special verdict form.

Sources and Authority

- Civil Code section 3346(a) provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."
- Code of Civil Procedure section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber . . . or otherwise injures any tree or timber on the land of another person . . . is liable to the owner of such land . . . for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."
- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)
- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)
- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)
- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)
- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' " (*Caldwell, supra*, 211 Cal.App.2d at pp. 763–764.)
- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage

that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes 'injuries to . . . trees . . . upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1733

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]

2. **That the condition affected a substantial number of people at the same time;**
3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**
4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**
5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**
6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2007

Directions for Use

Private nuisance concerns injury to a property interest. Public nuisance is not dependent on an interference with rights of land: "[A] private nuisance is a

civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted.)

Sources and Authority

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."
- Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."
- Civil Code section 3493 provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."
- Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. . . . ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent Venuto . . .

can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)

- "Unlike the private nuisance—tied to and designed to vindicate individual ownership interests in land—the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)
- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree . . . ." ' " (*Birke, supra*, 169 Cal.App.4th at p. 1551, internal citations omitted.)
- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify . . . the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)
- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra*, 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)
- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)
- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)
- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)
- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical

question is whether the defendant created or assisted in the creation of the nuisance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra,* 183 Cal.App.4th at p. 542, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 133

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 17:1–17:3

2030. Affirmative Defense—Statute of Limitations—Trespass or Private Nuisance

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***].**

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***], the lawsuit was still filed on time if [***name of plaintiff***] proves that the [trespass/nuisance] is continuous. A [trespass/nuisance] is continuous if it can be discontinued. Among the factors that indicate that the [trespass/nuisance] can be discontinued are the following:**

(a) That the [trespass/nuisance] is currently continuing;

(b) That the impact of the condition will vary over time;

(c) That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued.

[You must consider the continuous nature of the damage to the property that a nuisance causes, not the continuous nature of the acts causing the nuisance to occur.]]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for injury to real property. (See Code Civ. Proc., § 338(b).) This instruction may be used for a permanent trespass other than an action for damages for wrongful damage to timber, to which a five-year statute applies. (See Civ. Code, § 3346(c).) It may also be used for a permanent private nuisance. There is no limitation period for a public nuisance. (See Civ. Code, § 3490.) There is also essentially no statute of limitation for a continuing trespass or continuing private nuisance, but damages for future harm are not recoverable. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 291 [62 Cal.Rptr.3d 696] [nuisance]; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153

Cal.App.4th 583, 592 [63 Cal.Rptr.3d 165] [trespass].)

Include the optional second paragraph if there is an issue of fact as to whether the trespass or nuisance is permanent or continuous. If applicable, include the last sentence in the case of a nuisance.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

See also CACI No. 3903F, *Damage to Real Property (Economic Damage),* and CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

Sources and Authority

- Code of Civil Procedure section 338 provides in part:

  Within three years:

  (b) An action for trespass upon or injury to real property.

- Civil Code section 3490 provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."
- "[A] trespass may be continuing or permanent. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. . . . [¶] In contrast, a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. . . . Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 592.)
- "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after

the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [¶] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868–869 [218 Cal.Rptr. 293, 705 P.2d 866], internal citations and footnotes omitted.)

- "Historically, the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass has been continuing or permanent." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1148 [281 Cal.Rptr. 827].)
- "[G]enerally the principles governing the permanent or continuing nature of a trespass or nuisance are the same and the cases discuss the two causes of action without distinction." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 594.)
- "Generally, whether a trespass is continuing or permanent is a question of fact properly submitted to the jury. A trial court may remove the issue of fact from the jury by directed verdict only if there is no evidence tending to prove the case of the party opposing the motion." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 597, internal citations omitted.)
- "[T]he key question [in determining whether a trespass is continuous or permanent] is whether the trespass or nuisance can be discontinued or abated and there are a number of tests used to answer this question. A respected legal treatise summarizes the various tests as follows: '[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.' " (*Starrh & Starrh Cotton Growers. supra*, 153 Cal.App.4th at pp. 593–594, citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 22.39, pp. 148–149.)
- "The jury's conclusion that it was unknown whether the soil contamination could be abated by reasonable means at a reasonable cost means that plaintiff had failed to prove her claims of continuing nuisance

and trespass." (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 86 [103 Cal.Rptr.3d 37].)

- "[T]he 'continuing' nature of a nuisance 'refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.' " (*Lyles, supra*, 153 Cal.App.4th at p. 291, internal citation omitted.)
- "[A] cause of action for damage to real property accrues when the defendant's act causes ' *immediate and permanent* injury' to the property or, to put it another way, when there is '[a]ctual and appreciable harm' to the property." (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005 [13 Cal.Rptr.3d 462], original italics, internal citations omitted.)
- "Property damage cases . . . are different from medical malpractice cases in the sense that, when property is damaged, there is ordinarily some wrongful cause. Thus, when one's property is damaged, one should reasonably suspect that someone has done something wrong to him and, accordingly, be charged with knowledge of the information that would have been revealed by an investigation. That particular property damage could result from natural causes does not mean that the same property damage could result only from natural causes." (*Lyles, supra,* 153 Cal.App.4th at pp. 287–288.)
- "The traditional rule in tort cases is that the statute of limitations begins to run upon the *occurrence* of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. [¶] The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. This modified rule has been applied to latent defects in real property and improvements. In the case of such latent defects the statute of limitations begins to run only when 'noticeable damage occurs.' " (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406–407 [163 Cal.Rptr. 711], internal citations omitted, disapproved on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292 [45 Cal.Rptr.2d 241, 902 P.2d 259], original italics.)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass,* § 17.09[5] (Matthew Bender)

Brown et al., California Practice Guide: Civil Procedure Before Trial (The Rutter Group) ¶¶ 6:462–6:462.2

2 California Real Property Remedies and Damages, Ch. 11, *Remedies for Nuisance and Trespass* (Cont.Ed.Bar 2d ed.) §§ 11.38–11.40

1 California Forms of Pleading and Practice, Ch. 11, *Adjoining Landowners*, § 11.24 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, §§ 225.240–225.245 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.44 (Matthew Bender)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[*Name of plaintiff***] claims [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to defend [***name of plaintiff***] in a lawsuit that was brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was insured under an insurance policy with [***name of defendant***];**
2. **That a lawsuit was brought against [***name of plaintiff***];**
3. **That [***name of plaintiff***] gave [***name of defendant***] timely notice that [he/she/it] had been sued;**
4. **That [***name of defendant***], unreasonably or without proper cause, failed to defend [***name of plaintiff***] against the lawsuit;**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New October 2004; Revised December 2007

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction also assumes that the judge will decide the issue of whether the claim was potentially covered by the policy. If there are factual disputes regarding this issue, a special interrogatory could be used.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or settlement.

Sources and Authority

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)
- " '[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. . . . This duty . . . is separate from and broader than the insurer's duty to indemnify. . . .' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. . . . Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' . . ." . . . ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)
- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)
- "In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)
- "The obligation of the insurer to defend is of vital importance to the

insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. . . . This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)
- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision.*' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)
- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. . . . [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra*, 176 Cal.App.4th at p. 179, original italics.)
- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative*

Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)
- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group) ¶ 7:614.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 12:598–12:650.5

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

2505. Retaliation (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**
2. **[That [***name of defendant***] [discharged/demoted/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [***name of plaintiff***]'s employment;]**
3. **That [***name of plaintiff***]'s [***describe protected activity***] was a motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32

Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].) Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, replace element 2 with elements 4 and 5 of CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."
- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)
- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in

making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs., tit. 2, § 7287.8(a).)

- "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77].)
- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)
- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment

discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra,* 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)
- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)
- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)
- "The employment action must be both detrimental and substantial . . . . We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury . . . . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events . . . . The other allegations . . . are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000)

77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra*, 157 Cal.App.4th at p. 420.)
- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller, supra*, 36 Cal.4th at pp. 473–474, internal citations omitted.)
- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints . . . .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin, et al., California Practice Guide: Employment Litigation (The Rutter

Group) ¶¶ 7:680–7:841

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:74–2:75

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing. A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the department was similar or related to the conduct that occurred earlier;**
2. **The conduct was reasonably frequent; and**
3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

The burden is on [*name of plaintiff/name of defendant***] to prove that the complaint [was/was not] filed on time with the department.**

New June 2010

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723–724 [85 Cal.Rptr.3d 705].)

No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of

proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.

Sources and Authority

- Government Code section 12960 provides:

  (a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

  (b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

  (c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

  (d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:

    (1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

    (2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)
- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra*, 168 Cal.App.4th at pp. 720–721, internal citations omitted.)
- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing

reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." . . . The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra*, 88 Cal.App.4th at p. 64, internal citations omitted.)
- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra*, 88 Cal.App.4th at p. 65.)
- "The Supreme Court has extended the continuing violation doctrine to

retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:561.1, 7:975, 16:85

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2523. "Harassing Conduct" Explained

Harassing conduct may include [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment***];] [or]**

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] [or]

[e. [*Describe other form of harassment if appropriate***].]**

New September 2003; Revised December 2007

Directions for Use

Read this instruction with CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant;* or CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Read also CACI No. 2524, *"Severe or Pervasive" Explained*, if appropriate.

Sources and Authority

- Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract."
- The Fair Employment and Housing Commission's regulations (Cal. Code Regs., tit. 2, § 7287.6(b)(1)) provide:

  "Harassment" includes but is not limited to:

(A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.

- "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)
- "We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno, supra,* 18 Cal.4th at pp. 646–647, internal citation omitted.)
- "[W]e can discern no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee

would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

- "Here, [plaintiff]'s *discrimination* claim sought compensation for official employment actions that were motivated by improper bias. These discriminatory actions included not only the termination itself but also official employment actions that preceded the termination, such as the progressive disciplinary warnings and the decision to assign [plaintiff] to answer the office telephones during office parties. [Plaintiff]'s *harassment* claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to [plaintiff]. These harassing actions included [supervisor]'s demeaning comments to [plaintiff] about her body odor and arm sores, [supervisor]'s refusal to respond to [plaintiff]'s greetings, [supervisor]'s demeaning facial expressions and gestures toward [plaintiff], and [supervisor]'s disparate treatment of [plaintiff] in handing out small gifts. None of these events can fairly be characterized as an official employment action. None involved [supervisor]'s exercising the authority that [employer] had delegated to her so as to cause [employer], in its corporate capacity, to take some action with respect to [plaintiff]. Rather, these were events that were unrelated to [supervisor]'s managerial role, engaged in for her own purposes." (*Roby, supra*, 47 Cal.4th at pp. 708–709, original italics, footnote omitted.)
- "[S]ome official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias. Here, some actions that [supervisor] took with respect to [plaintiff] are best characterized as official employment actions rather than hostile social interactions in the workplace, but they may have contributed to the hostile message that [supervisor] was expressing to [plaintiff] in other, more explicit ways. These would include [supervisor]'s shunning of [plaintiff] during staff meetings, [supervisor]'s belittling of [plaintiff]'s job, and [supervisor]'s reprimands of [plaintiff] in front of [plaintiff]'s coworkers. Moreover, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager were similarly motivated by discriminatory animus." (*Roby, supra*, 47 Cal.4th at p. 709.)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation (The Rutter

Group) ¶¶ 10:125–10:155

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13, 3.36

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.80[1][a][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:56–2:56.1

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [perceived] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];] [or]**

   [That [*name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

6. **[That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***]] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of] [a] [***e.g., physical condition***]] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];]**

7. **That [***name of plaintiff***] was harmed; and**

8. That [*name of defendant*]'s [decision/conduct] was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had." (See Gov. Code, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P3d 118].)

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(h), (i), (k).)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the . . . physical disability, mental disability, [or] medical condition . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."
- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."
- For a definition of "medical condition," see Government Code section 12926(h).
- For a definition of "mental disability," see Government Code section 12926(i).
- For a definition of "physical disability," see Government Code section 12926(k).
- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."
- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes'

associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "Summary adjudication of the section 12940(a) claim . . . turns on . . . whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)
- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. . . . However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless,

FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], internal citations omitted, original italics.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. . . . While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations . . . ." . . . ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2160–9:2241

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:46

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. That [*name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**
6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "[*name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(h), (i), (k).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P3d 118].) There is apparently some divergence of authority as to whether this rule applies to cases under Government Code section 12940(m), and if so, which party bears the burden of proof. (See *id.* at p. 265; compare *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190] with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360–363 [118 Cal.Rptr.2d 443].) If the court decides that the plaintiff does not bear the burden of proof, omit element 5.

If the plaintiff bears the burden of proof, there may also be an issue of how far the employee must go with regard to whether a reasonable accommodation was possible. The rule has been that the employer has an

affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, one court has said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 978.) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra*, 53 Cal.App.4th at pp. 950–951; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [82 Cal.Rptr.3d 440] [employee must request an accommodation].)

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in . . . subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."
- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation

would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9.)

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:

  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."
- For a definition of "medical condition," see Government Code section 12926(h).
- For a definition of "mental disability," see Government Code section 12926(i).
- For a definition of "physical disability," see Government Code section 12926(k).
- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, . . . an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, . . . it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)
- "Although no particular form of request is required, ' "[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is 'aware of respondent's disability and physical limitations. . . .' " ' ' "[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. . . ." . . . ' " (*Avila, supra,* 165 Cal.App.4th at pp. 1252–1253, internal citations omitted.)
- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 947.)
- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 954, internal citation omitted.)
- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.

- "Under the FEHA . . . an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)
- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2250–9:2285, 9:2345–9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **That [***name of plaintiff***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**
4. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her] [***e.g., physical condition***] so that [he/she] would be able to perform the essential job requirements;**
5. **That [***name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**
6. **That [***name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing**

[*name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained.*

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Sources and Authority

- Government Code section 12940(n) provides that it is an unlawful

employment practice, unless based on a bona fide occupational qualification or on applicable security regulations established by the United States or the State of California, "[f]or an employer or other entity covered by [the FEHA] to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- Government Code section 12926.1(e) provides that the Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.
- The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix, provides, in part:

  When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

  (1) Analyze the particular job involved and determine its purpose and essential functions;

  (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

  (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

  (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.
- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a

reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)
- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it to reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p. 62, fn. 23.)
- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. . . . To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)
- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a

separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree . . . with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)
- "We synthesize *Wysinger, Nadaf-Rahrov, and Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . .' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2280–9:2285, 9:2345–9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation (Thomson West) Discrimination in Employment, § 2:50

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/ an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] [know that [***name of plaintiff* **had/ treat [***name of plaintiff***] as if [he/she] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of plaintiff***] able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]?**

   _____ **Yes** _____ **No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff***]'s [perceived] [history of [a]] [***e.g., physical condition***] a motivating reason for [***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

_____ Yes _____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2007, December 2009, June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment— Essential Factual Elements.*

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she] had."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in question 3. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k)

[no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/ an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**

   _____ **Yes** _____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of plaintiff***] subjected to [***either***]**

   [[harassing conduct/discrimination] because [he/she] [was/ was believed to be/was associated with a person who was/ was associated with a person who was believed to be] [*protected status***]?]**

   [*or***]**

   [retaliation because [he/she] [opposed [*name of defendant***]'s unlawful and discriminatory employment practices/ [or] [filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]?]**

   _____ **Yes** _____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [***name of defendant***] fail to take reasonable steps to prevent the [harassment/discrimination/retaliation]?**

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s failure to prevent the [harassment/discrimination/retaliation] a substantial factor in causing harm to [*name of plaintiff*]?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New June 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred before judgment.

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her] civil rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [intentionally/[*other applicable state of mind*]] [*insert wrongful act*];**
2. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
3. **That [*name of defendant*]'s conduct violated [*name of plaintiff*]'s right [*insert right, e.g., "of privacy"*];**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s [*insert wrongful act*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393–394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)
- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." (*Jones v. Williams* (9th Cir. 2002) 286 F.3d 1159, 1162–1163, internal citations omitted.)
- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)
- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)
- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)
- "Constitutional torts employ the same measure of damages as common

law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights . . . .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer],' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

3010. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force against [***name of plaintiff***];**
2. **That the force used was excessive;**
3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s use of excessive force was a substantial factor in causing [***name of plaintiff***]'s harm.**

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.***]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."
- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)
- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v.*

McMillian (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)
- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)
- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. . . . 'When prison officials maliciously and sadistically use force to cause harm,' . . . 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) ___ U.S. ___ [130 S.Ct. 1175, 175 L.Ed.2d 995, 999].)
- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. . . . [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. . . . [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra,* ___ U.S. at p. ___ [175 L.Ed.2d at p. 999], original italics, internal citations omitted.).

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)
- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties.' " By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer],' " does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3016. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for exercising a constitutional right. [By [***specify conduct***], [***name of plaintiff***] was exercising [his/her] constitutionally protected right of [***insert right, e.g., privacy***].] To establish retaliation, [***name of plaintiff***] must prove all of the following:**

1. **[That [he/she] was engaged in a constitutionally protected activity;]**
2. **That [***name of defendant***] [***specify alleged retaliatory conduct***];**
3. **That [***name of defendant***]'s acts were motivated, at least in part, by [***name of plaintiff***]'s protected activity;**
4. **That [***name of defendant***]'s acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and**
5. **That [***name of plaintiff***] was harmed as a result of [***name of defendant***]'s conduct.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 1 above. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]]**

New June 2010

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* if the claimed civil rights violation is retaliation for exercising constitutionally protected rights. The retaliation should be alleged generally in element 1 of CACI No. 3000.

The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000. Whether plaintiff was engaged in a constitutionally protected activity will usually have been resolved by the court as a matter of law. If so, include the optional statement in the opening paragraph and omit element 1. If there is a question of fact that the jury must

resolve with regard to the constitutionally protected activity, include element 1 and give the last part of the instruction.

There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part*, by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at pp. 1086–1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability.

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin, supra*, 177 Cal.App.4th at pp. 1062–1063.)
- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra*, 177 Cal.App.4th at p. 1084.)
- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra*, 177 Cal.App.4th at p. 1082.)
- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence."

(*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010) 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 820, 885A

3 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, § 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, § 21.22[F] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely to be true than not true:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [***insert one of the following:***]**

   [[took/hid/appropriated/obtained/ [or] retained] [*name of plaintiff/decedent***]'s property;]**

   [*or***]**

   [[assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [[took/hid/appropriated/obtained [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[One way [*name of plaintiff***] can prove that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] knew or should have known that [his/her] conduct was likely to be harmful to [***name of plaintiff/decedent***].**

[[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the**

property if [*name of plaintiff/decedent***] was deprived of the property by an agreement, gift, will, [or] trust[, or] [***specify other testamentary instrument***] regardless of whether the property was held by [***name of plaintiff/decedent***] or by [his/her] representative.]**

New September 2003; Revised June 2005, October 2008, April 2009, June 2010

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering.*

If the individual responsible for the financial abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If undue influence is alleged in element 3 (See Welf. & Inst. Code, § 15610.30(a)(3)), CACI No. 334, *Affirmative Defense—Undue Influence*, may be adapted for a definition.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

If "for a wrongful use" is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.23 provides:

(a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."
- Welfare and Institutions Code section 15610.30 provides:

(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a

wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or person property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder or dependent adult.

(d) For purposes of this section, "representative" means a person or entity that is either of the following

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment . . . .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, . . .' etc., who 'treats an elder . . . for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders,* § 5.33[4] (Matthew Bender)

3201. Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] failed to promptly purchase or replace [a/an] [***new motor vehicle***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**
2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**
3. **That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [***name of plaintiff***]'s situation;**
4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s];]**
5. **That [***name of defendant***] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**
6. **That [***name of defendant***] did not promptly replace or buy back the vehicle.**

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically**

intended to create a warranty. A warranty is not created if [*name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

New September 2003; Revised February 2005, December 2005, April 2007, December 2007

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

See also CACI No. 3202, *"Repair Opportunities" Explained*, CACI No. 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption*, and CACI No. 3204, *"Substantially Impaired" Explained*.

Sources and Authority

- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of

a claimed defect.

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an . . . express warranty . . . may bring an action for the recovery of damages and other legal and equitable relief."
- Civil Code section 1790.3 provides: "The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail."
- Civil Code section 1791.2 provides:

  (a) "Express warranty" means:

    (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or

    (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.

  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.
- Civil Code section 1795 provides, in part: "If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer."
- Civil Code section 1793.22(e)(2) provides, in part: " 'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle . . . that is bought or used primarily for business purposes

by a person . . . or any . . . legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion . . ., a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty."

- Civil Code section 1793.2(d)(2) provides, in part: "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer. . . . However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle."
- Civil Code section 1793.2(c) provides, in part: "The buyer shall deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section."
- Civil Code section 1793.1(a)(2) provides, in part: "The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed."
- Civil Code section 1795.6 provides, in part:

  (a) Every warranty period relating to an . . . express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the

manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if . . . : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. . . . [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra*, 90 Cal.App.4th at p. 1101.)
- The Song-Beverly Act does not apply unless the vehicle was purchased in

California. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490 [30 Cal.Rptr.3d 823, 115 P.3d 98].)

- "Under well-recognized rules of statutory construction, the more specific definition [of 'new motor vehicle'] found in the current section 1793.22 governs the more general definition [of 'consumer goods'] found in section 1791." (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)
- " 'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term is similar to what the average person would understand to be a 'defect.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, fn.11 [50 Cal.Rptr.3d 731] [nonconformity can include entire complex of related conditions].)
- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra,* 34 Cal.App.4th at p. 1250.)
- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that. . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable opportunity to repair the vehicle.' " (*Oregel, supra*, 90 Cal.App.4th at p. 1103, original italics, internal citation omitted.)

- "[T]he Act does not require consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties—other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. . . . In reality, . . . , the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [104 Cal.Rptr.3d 853], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.*, Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.104 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

3212. Duration of Implied Warranty

An implied warranty is in effect for one year after the sale of the [*consumer good*], unless a shorter period is stated in a writing that comes with the [*consumer good*], provided that the shorter period is reasonable. In no event will an implied warranty be in effect for less than 60 days.

[The time period of an implied warranty is lengthened by the number of days that the [*consumer good*] was made available by [*name of plaintiff*] for repairs under the warranty, including any delays caused by circumstances beyond [*name of plaintiff*]'s control].

New September 2003

Directions for Use

If the consumer goods at issue are not new, the instruction must be modified to reflect the shorter implied warranty period provided in Civil Code section 1795.5(c) (i.e., no less than 30 days but no more than three months).

Sources and Authority

- Civil Code section 1791.1(c) provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."
- Civil Code section 1795.6 provides, in part:

  > (a) Every warranty period relating to an implied . . . warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or

(2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

(b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if . . . : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

- Civil Code section 1795.5 provides, in part: "[T]he obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under [the act] except: . . . [t]he duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event shall such implied warranties have a duration of less than 30 days nor more than three months following the sale of used consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to such goods, or parts thereof, the duration of the implied warranties shall be the maximum period prescribed above."
- "On appeal, [defendants] concede that the duration provision is not a statute of limitations and that the applicable statute of limitations is four years. They argue, however, that the judgment can be affirmed on other

grounds. Among other arguments, they contend that the duration provision of the Song-Beverly Act should be interpreted as barring an action for breach of the implied warranty of merchantability when the purchaser fails to discover and report the defect to the seller within the time period specified in that provision. We reject this argument because the plain language of the statute, particularly in light of the consumer protection policies supporting the Song-Beverly Act, make clear that the statute merely creates a limited, prospective duration for the implied warranty of merchantability; it does not create a deadline for discovering latent defects or for giving notice to the seller." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1301 [95 Cal.Rptr.3d 285].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 325

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.17

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.51–502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.117 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:7

3213. Affirmative Defense—Statute of Limitations (U. Com. Code, § 2725)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that**

[the date of [tender of] delivery occurred before [*insert date four years before filing of complaint***].]**

[*or***]**

[any breach was discovered or should have been discovered before [*insert date four years before filing of complaint***].]**

New June 2010

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California's Uniform Commercial Code section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of U. Com. Code, § 2725 applies to warranty claims under Song-Beverly].)

A breach of warranty occurs when tender of delivery is made. (U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the aggrieved party's knowledge of the breach—that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (U. Com. Code, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215–220 [285 Cal.Rptr. 717].)

Under the Uniform Commercial Code, by the original agreement the parties

may reduce the period of limitation to not less than one year but may not extend it. (U. Com. Code, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See Civ. Code, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over U. Com. Code].)

Sources and Authority

- Uniform Commercial Code section 2725 provides:
  (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
  (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
  (3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
  (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.
- Civil Code section 1790.1 provides: "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void."
- Civil Code section 1790.3 provides: "The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail."

- "The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See Civ. Code, § 1790.3.) California Uniform Commercial Code section 2725 specifically governs actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of Code of Civil Procedure section 338, subdivision (a) for liabilities created by statute." (*Krieger, supra*, 234 Cal.App.3d at p. 215.)
- "[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the California Uniform Commercial Code. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff] purchased it . . . . Because he filed this action three years seven months after that date, he did so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra,* 174 Cal.App.4th at p. 1306.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 213

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 474, 519, 962

1 California Products Liability Actions, Ch. 8, *Statute of Limitations* § 8.021 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 500, *Sales Under the Commercial Code*, § 500.78 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.05

3221. Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant***] claims that it did not breach any implied warranties because the [***consumer good***] was sold on an "as is" or "with all faults" basis. To succeed, [***name of defendant***] must prove both of the following:**

1. **That at the time of sale a clearly visible written notice was attached to the [***consumer good***]; and**
2. **That the written notice, in clear and simple language, told the buyer each of the following:**
   a. **That the [***consumer good***] was being sold on an "as is" or "with all faults" basis;**
   b. **That the buyer accepted the entire risk of the quality and performance of the [***consumer good***]; and**
   c. **That if the [***consumer good***] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

New September 2003; Revised June 2010

Directions for Use

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with Civil Code section 1792.4(b).

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving leases of consumer goods.

If at the time of sale, or within 90 days thereafter, the defendant sold the plaintiff a service contract that applied to the product, the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act preempts use of this defense. (See 15 U.S.C. § 2308.)

Sources and Authority

- Civil Code section 1792.3 provides: "No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as

is' or 'with all faults' basis where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."

- Civil Code section 1791.3 provides: "[A] sale 'as is' or 'with all faults' means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this [act]."
- Civil Code section 1792.4 provides:

> (a) No sale of goods, governed by the provisions of this [act], on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:
>
> (1) The goods are being sold on an "as is" or "with all faults" basis.
>
> (2) The entire risk as to the quality and performance of the goods is with the buyer.
>
> (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.
>
> (b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale.

- Civil Code section 1793 provides, in part: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."
- Civil Code section 1792.5 provides: "Every sale of goods that are governed by the provisions of this [act], on an 'as is' or 'with all faults' basis, made in compliance with the provisions of this [act], shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness."
- Civil Code section 1795.4(e) provides: "A lessor who re-leases goods to a new lessee and does not retake possession of the goods prior to consummation of the re-lease may, notwithstanding the provisions of

Section 1793, disclaim as to that lessee any and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed."

- Title 15 United States Code section 2308 provides:

  (a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

  (b) Limitation on duration. For purposes of this title [15 USCS §§ 2301 et seq.] (other than section 104(a)(2)) [15 USCS § 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

  (c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 90

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.53–3.61

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.34[3], Ch. 8, *Defenses*, § 8.07[5][c] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.72 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:8–53:9, 53:58

3241. Restitution From Manufacturer—New Motor Vehicle

If you decide that [*name of defendant***] or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then [***name of plaintiff***] is entitled to recover the amounts [he/she] proves [he/she] paid for the car, including:**

1. **The amount paid to date for the vehicle, including finance charges [and any amount still owed by [***name of plaintiff***]];**
2. **Charges for transportation and manufacturer-installed options; and**
3. **Sales tax, license fees, registration fees, and other official fees.**

In determining the purchase price, do not include any charges for items supplied by someone other than [*name of defendant***].**

[[*Name of plaintiff***]'s recovery must be reduced by the value of the use of the vehicle before it was [brought in/submitted] for repair. [***Name of defendant***] must prove how many miles the vehicle was driven between the time when [***name of plaintiff***] took possession of the vehicle and the time when [***name of plaintiff***] first delivered it to [***name of defendant***] or its authorized repair facility to fix the defect. [***Insert one of the following:***]**

[Using this mileage number, I will reduce [*name of plaintiff***]'s recovery based on a formula.]**

[Multiply this mileage number by the purchase price, including any charges for transportation and manufacturer-installed options, and divide that amount by 120,000. Deduct the resulting amount from [*name of plaintiff***]'s recovery.]]**

New September 2003; Revised February 2005, June 2005

Directions for Use

This instruction is intended for use with claims involving new motor vehicles under the Song-Beverly Consumer Warranty Act. For claims involving other consumer goods, see CACI No. 3240, *Reimbursement Damages—Consumer Goods*. For claims involving incidental damages, see CACI No. 3242, *Incidental Damages*.

This instruction can be modified if it is being used for claims other than those described in the instructions. In lieu of restitution, plaintiff may request replacement with "a new motor vehicle substantially identical to the vehicle replaced," pursuant to Civil Code section 1793.2(d)(2)(A). If plaintiff so requests, elements 1–3 should be replaced with appropriate language.

Modify element 1 depending on whether plaintiff still has an outstanding obligation on the financing of the vehicle.

The last two bracketed options are intended to be read in the alternative. Use the last bracketed option if the court desires for the jury to make the calculation of the deduction. The "formula" referenced in the last bracketed paragraph can be found at Civil Code section 1793.2(d)(2)(C).

Sources and Authority

- Civil Code section 1794(b) provides:

  > The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following:
  >
  > (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  >
  > (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Civil Code section 1793.2(d)(2) provides, in part:

  > If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.
  >
  > (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific

kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

- "[A]s the conjunctive language in Civil Code section 1794 indicates, the statute itself provides an additional measure of damages beyond replacement or reimbursement and permits, at the option of the buyer, the Commercial Code measure of damages which includes 'the cost of repairs necessary to make the goods conform.' " (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 [45 Cal.Rptr.2d 10], internal citation omitted.)
- "[I]n the usual situation, emotional distress damages are *not* recoverable under the Song-Beverly Consumer Warranty Act." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 625, fn. 15 [39 Cal.Rptr.2d 159], emphasis in original; see also *Kwan v. Mercedes-Benz of N. Am.* (1994) 23 Cal.App.4th 174, 187–192 [28 Cal.Rptr.2d 371].)
- "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the Song-Beverly Consumer Warranty Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37 [95 Cal.Rptr.2d 81].)
- "[Defendant] argues that [plaintiff] would receive a windfall if he is not required to pay for using the car after his buyback request. But to give [defendant] an offset for that use would reward it for its delay in replacing the car or refunding [plaintiff]'s money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [13 Cal.Rptr.3d 679].)
- "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after [defendant] had a duty to respond promptly to [plaintiff]'s demand for restitution—would reward [defendant] for its delay in refunding [plaintiff]'s money." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053 [104 Cal.Rptr.3d 853].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*,

§ 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.127, 206.128 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:26

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe violation of Song-Beverly Consumer Warranty Act***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. "Willful" means that [***name of defendant***] knew what [he/she/it] was doing and intended to do it. However, you may not impose a civil penalty if you find that [***name of defendant***] believed reasonably and in good faith that [***describe facts negating statutory obligation***].**

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff***]'s actual damages.**

New September 2003; Revised February 2005, December 2005

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). The parties will need to draft a separate instruction for cases involving a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2).

If there are multiple causes of action, ensure that the jury knows to which claim this instruction applies.

Sources and Authority

- Civil Code section 1794 provides, in part:

> (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
>
> . . . .

> (c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action . . . or with respect to a claim based solely on a breach of an implied warranty.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)
- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)
- "[A] violation . . . is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors,* LLC (2010) 181 Cal.App.4th

1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 184 [28 Cal.Rptr.2d 371].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:32

3713. Nondelegable Duty

[*Name of defendant***] has a duty that cannot be delegated to another person arising from [***insert name, popular name, or number of regulation, statute, or ordinance***/a contract between the parties/***other, e.g., the landlord-tenant relationship***]. Under this duty,**

[*insert requirements of regulation, statute, or ordinance or otherwise describe duty***].**

[*Name of plaintiff***] claims that [he/she] was harmed by the conduct of [***name of independent contractor***] and that [***name of defendant***] is responsible for this harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] hired [***name of independent contractor***] to [***describe job involving nondelegable duty, e.g., repair the roof***];**
2. **That [***name of independent contractor***] [***specify wrongful conduct in breach of duty, e.g., did not comply with this law***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of independent contractor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New October 2004; Revised June 2010

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of an independent contractor if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463].)

Sources and Authority

- Restatement Second of Torts, section 424, provides: "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."
- "As a general rule, a hirer of an independent contractor is not liable for

physical harm caused to others by the act or omission of the independent contractor. There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties. . . . ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] . . . ' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5], internal citations omitted.)

- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)
- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726.)
- "Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)
- "Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513].)
- A California public agency is subject to the imposition of a nondelegable duty in the same manner as any private individual. (Gov. Code, § 815.4; *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553].)

- "It is undisputable that '[t]he question of duty is . . . a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162] internal citation omitted.) "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (*Id.* at p. 1187, fn. 5.)
- " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. . . . It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co.* (1955) 44 Cal.2d 793, 800 [285 P.2d 912], internal citation omitted.)
- "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that ' "he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law" ' but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1247

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.42 (Matthew Bender)

3721. Scope of Employment—Peace Officer's Misuse of Authority

[*Name of plaintiff***] must prove that [***name of agent***] was acting within the scope of [his/her] [employment/authorization] when [***name of plaintiff***] was harmed.**

The conduct of a peace officer is within the scope of [his/her] employment as a peace officer if all of the following are true:

(a) The conduct occurs while the peace officer is on duty as a peace officer;

(b) The conduct occurs while the peace officer is exercising [his/her] authority as a peace officer; and

(c) The conduct results from the use of [his/her] authority as a peace officer.

New September 2003

Sources and Authority

- "[W]e hold that when, as in this case, a police officer on duty misuses his official authority by raping a woman whom he has detained, the public entity that employs him can be held vicariously liable. This does not mean that, as a matter of law, the public employer is vicariously liable whenever an on-duty officer commits a sexual assault. Rather, this is a question of fact for the jury." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)
- "The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect for that authority. Therefore, it must suffer the consequences when the authority is abused." (*White v. County of Orange* (1985) 166 Cal.App.3d 566, 572 [212 Cal.Rptr. 493].)
- "It is questionable whether the holding in *Mary M.* is still viable. Indeed, the Chief Justice of California has described it as an 'aberrant holding' that was 'wrongly decided' and should be 'overrule[d].' Nonetheless, it remains the rule of law unless a majority of the California Supreme Court decides otherwise." (*M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 124 [98 Cal.Rptr.3d 812], internal citations omitted.)
- "We reject plaintiff's effort to apply *Mary M.* to the facts of this case. For

reasons that follow, we conclude the *Mary M.* holding that a public employer of a police officer may be vicariously liable for a sex crime committed by the officer against a person detained by the officer while on duty is, at best, limited to such acts by an on-duty police officer and does not extend to any other form of employment, including firefighting. Thus, as a matter of law, the alleged sexual assault by firefighters in this case was not conduct within in the scope of their employment and cannot support a finding that their employer . . . is vicariously liable for the harm." (*M.P., supra,* 177 Cal.App.4th at p. 124.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 170, 180, 185, 190

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][f][ii] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 3:8

3903F. Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* "6."**] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove [the reduction in the property's value/ [or] the reasonable cost of repairing the harm]. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts. [However, if [***name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]]**

[To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.]**

[To determine whether the cost of repairing the harm is reasonable, you must decide if there is a reasonable relationship between the cost of repair and the harm caused by [*name of defendant***]'s conduct. You must consider the expense and time involved to restore the property to its original condition compared to the value of the property [and [***insert other applicable factors.***]].**

If you find that the cost of repairing the harm is not reasonable, then you may award any reduction in the property's value.]

New September 2003; Revised April 2008, April 2009

Directions for Use

Give this instruction for damages to real property caused by trespass, permanent nuisance, or other tortious conduct. See also CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

If there is evidence of both diminution in value and cost of repair, include all optional paragraphs. However, include the last bracketed sentence in the first paragraph only if the judge has determined that the claimed personal reasons are legally sufficient to justify the costs of repair.

If only the cost of repair is at issue, give just the first paragraph. However, if the reasonableness of the cost of repair is at issue, then the value of the property must be considered, and all paragraphs must be included. If only diminution of value is at issue, omit the last two optional paragraphs.

Sources and Authority

- Civil Code section 3334(a) provides: "The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession."
- "For tortious injury to real property, the general rule is that the plaintiff may recover the lesser of (1) the diminution in the property's fair market value, as measured immediately before and immediately after the damage; or (2) the cost to repair the damage and restore the property to its pretrespass condition, plus the value of any lost use. The practical effect of this rule is to limit damages to property to the fair market value of the property prior to the damage." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 450 [102 Cal.Rptr.3d 32].)
- "Diminution in market value . . . is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104].)
- "Defendant . . . contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants

to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)

- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)
- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)
- "Civil Code section 3334 requires that restoration costs be *reasonable*. In addition, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass. *Mangini* explains that whether abatement costs are *reasonable* requires an evaluation of a number of fundamental considerations, including the expense and time required to perform the abatement, along with other legitimate competing interests. (*Mangini, supra,* 12 Cal.4th at p. 1100; see also *Beck, supra,* 44 Cal.App.4th at pp. 1221–1222 [reasonableness includes consideration of monetary expense, burden on public, and costs of remediation versus value of land].)" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601 [63 Cal.Rptr.3d 165], original italics.)
- "The trial court must instruct the jury on how to determine whether the statutory requirement that any restoration costs be reasonable was met. It must also advise the jury what to do if the jury concludes the evidence shows the proposed restoration project to be unreasonable." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at pp. 600–601.)
- "Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant." (*Kelly, supra,* 179 Cal.App.4th at p. 451.)

- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 604.)
- "[I]f a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value. This rule is sometimes referred to as the ' "personal reason" exception.' Even when this exception applies, however, restoration costs 'are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained.' " (*Kelly, supra,* 179 Cal.App.4th at pp. 450–451, internal citations omitted.)
- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 688 [266 Cal.Rptr. 193].)
- "Under California law, damages for diminution in value may only be recovered for permanent, not continuing, nuisances." (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 663 [81 Cal.Rptr.3d 219].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1727, 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* § 52.35 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.44 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass,* § 225.147 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

3930. Mitigation of Damages (Personal Injury)

If you decide [*name of defendant*] is responsible for the original harm, [*name of plaintiff*] is not entitled to recover damages for harm that [*name of defendant*] proves [*name of plaintiff*] could have avoided with reasonable efforts or expenditures.

You should consider the reasonableness of [*name of plaintiff*]'s efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures without undue risk or hardship.

If [*name of plaintiff*] made reasonable efforts to avoid harm, then your award should include reasonable amounts that [he/she] spent for this purpose.

New September 2003

Sources and Authority

- "It has been the policy of the courts to promote the mitigation of damages. The doctrine applies in tort, wilful as well as negligent. A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures." (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796], internal citations omitted.)
- "The frequent statement of the principle in the terms of a 'duty' imposed on the injured party has been criticized on the theory that a breach of the 'duty' does not give rise to a correlative right of action. It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part." (*Green*, *supra*, 261 Cal.App.2d at p. 396, internal citations omitted.)
- "The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the

standard required in other areas of law. It is sufficient if he acts reasonably and with due diligence, in good faith." (*Green, supra,* 261 Cal.App.2d at pp. 396–397, internal citations omitted.)

- "The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts and circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self-care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant." (*Christiansen v. Hollings* (1941) 44 Cal.App.2d 332, 346 [112 P.2d 723], internal citations omitted.)
- " 'The rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.' " (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 [32 Cal.Rptr.2d 329], internal citations omitted.)
- "The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures." (*Valencia v. Shell Oil Co.* (1944) 23 Cal.2d 840, 846 [147 P.2d 558], internal citations omitted.)
- "Contributory negligence was closely allied and easily confused with the rule of mitigation of damages, on which the jury was also instructed. Both doctrines involved the plaintiff's duty to act reasonably. Contributory negligence was concerned with the plaintiff's negligence before being injured, while the mitigation rule was concerned with a lack of due care after the injury. The effect of contributory negligence was to bar all recovery by the plaintiff. In contrast, a plaintiff's failure to mitigate barred recovery of only the portion of damages which could have been avoided by ordinary care after the injury." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 874–875 [148 Cal.Rptr. 355, 582 P.2d 946], internal citations omitted.)
- " 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted . . . .' " (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1066 [232 Cal.Rptr. 528, 728 P.2d 1163], internal citations omitted.)
- "[W]hile the burden of proving the extent of injury . . . actually incurred as a result of a defendant's tortious conduct lies with the plaintiff, the burden of proving the plaintiff failed to act reasonably in limiting his or

her consequential damages—that is, failed to mitigate damages—is on the defendant . . . ." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97 [101 Cal.Rptr.3d 303].)

- "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant." (*Oakland v. Pacific Gas & Electric Co.* (1941) 47 Cal.App.2d 444, 450 [118 P.2d 328], internal citations omitted.)
- "It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden." (*McNary v. Hanley* (1933) 131 Cal.App. 188, 190 [20 P.2d 966].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1624–1627

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, §§ 15.22–15.23

4 Levy et al., California Torts, Ch. 53, *Mitigation and Collateral Source Rule*, §§ 53.01–53.04 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.48 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.171 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 6:1–6:6

4102. Duty of Undivided Loyalty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of loyalty. [A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] owes [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]] undivided loyalty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**
2. **That [***name of defendant***] [***insert one of the following:***]**

   [knowingly acted against [*name of plaintiff***]'s interests in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**

   [acted on behalf of a party whose interests were adverse to [*name of plaintiff***] in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**
3. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; Revised June 2010

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by*

Attorney—Essential Factual Elements.

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

If the parties dispute whether the plaintiff gave informed consent (element 3), the court may wish to add explanatory language or a separate instruction on what constitutes informed consent. (See, e.g., Rest. 3d Agency, § 8.06(1).)

Sources and Authority

- Restatement Third of Agency, section 8.01, states: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."
- Restatement Third of Agency, section 8.02, states: "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."
- Restatement Third of Agency, section 8.03, states: "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."
- Restatement Third of Agency, section 8.04, states: "Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship."
- Restatement Third of Agency, section 8.05, states:

  An agent has a duty

  (1) not to use property of the principal for the agent's own purposes or those of a third party; and

  (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

- Restatement Third of Agency, section 8.06, states:

  (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

- "Every agent owes his principal the duty of undivided loyalty. During the course of his agency, he may not undertake or participate in activities adverse to the interests of his principal. In the absence of an agreement to the contrary, an agent is free to engage in competition with his principal after termination of his employment but he may plan and develop his competitive enterprise during the course of his agency only where the particular activity engaged in is not against the best interests of his principal." (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 287 [40 Cal.Rptr. 203].)
- "The determination of the particular factual circumstances and the application of the ethical standards of fairness and good faith required of

a fiduciary in a given situation are for the trier of facts." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 288, internal citation omitted.)

- "[T]he protection of the principal's interest requires a full disclosure of acts undertaken in preparation of entering into competition." (*Sequoia Vacuum Systems, supra*, 229 Cal.App.2d at p. 287, internal citation omitted.)
- "It is settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. An officer or director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for itself all benefits so obtained." (*Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554 [31 Cal.Rptr. 104], internal citations omitted.)
- "A fiduciary relationship is ' "any relation existing between parties to a transaction wherein one of the parties is . . . duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860].)
- "Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' " (*Wolf, supra*, 107 Cal.App.4th at p. 30, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 65–84

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.20 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**
3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**
4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**
5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property[, or that [***name of defendant***] actually received this notice at least three days before [***date on which action was filed***]]; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 5. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves waste, nuisance, or illegal activity and cannot be cured (see Code Civ. Proc., § 1161(4)), omit the bracketed language in element 5 and element 6. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246], internal citation omitted.)

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

Local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. This instruction should be modified accordingly.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

  A tenant of real property . . . is guilty of unlawful detainer:

  3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

- Civil Code section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action . . . ."

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession

of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)
- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at pp. 1051–1052, internal citations omitted.)
- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer,* 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions,* § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:201

4320. Affirmative Defense—Implied Warranty of Habitability

[*Name of defendant***] claims that [he/she] does not owe [any/the full amount of] rent because [***name of plaintiff***] did not maintain the property in a habitable condition. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] failed to provide one or more of the following:**

a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors[./; or]

b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

f. [building, grounds, and all areas of the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of***

***defendant*] failed or refused to pay rent and was served with a notice to pay rent or quit cannot be a defense to the previous nonpayment.**

[Even if [*name of defendant*] proves that [*name of plaintiff*] substantially failed to meet any of these requirements, [*name of defendant*]'s defense fails if [*name of plaintiff*] proves that [*name of defendant*] has done any of the following that contributed substantially to the condition or interfered substantially with [*name of plaintiff*]'s ability to make the necessary repairs:

> **[substantially failed to keep [his/her] living area as clean and sanitary as the condition of the property permitted][./; or]**
>
> **[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]**
>
> **[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]**
>
> **[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]**
>
> **[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]**

The fact that [*name of defendant*] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield*

(1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

There is no requirement that the tenant give notice of the condition to the landlord (See *Knight, supra*, 29 Cal.3d at p. 54). In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].)

Sources and Authority

- Civil Code section 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine."
- Code of Civil Procedure section 1174.2 provides:

  (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are

completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

(b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

(c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

(d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

- Civil Code section 1941.1 provides:

  A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:

  (a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

  (b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.

  (c) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running

water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.

(h) Floors, stairways, and railings maintained in good repair.

- Civil Code section 1941.2 provides:

(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.

(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.

(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(4) Not to permit any person on the premises, with his

permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

- Civil Code section 1942.4(a) provides:

(a) A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure, if all of the following conditions exist prior to the landlord's demand or notice:

(1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling.

(2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions.

(3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. For purposes of this subdivision, service shall be complete at the time of deposit in the United States mail.

(4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2.

- "Once we recognize that the tenant's obligation to pay rent and the

landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)

- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)
- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)
- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)
- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has

actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)

- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)
- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra,* 29 Cal.3d at p. 57.)
- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra,* 29 Cal.3d at p. 58.)
- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)
- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 625

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109–8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64,

12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:224

4321. Affirmative Defense—Retaliatory Eviction—Tenant's Complaint (Civ. Code, § 1942.5)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] filed this lawsuit in retaliation for [***name of defendant***]'s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [***name of defendant***] must prove all of the following:**

[1. That [*name of defendant***] was not in default in the payment of [his/her/its] rent;]**

2. That [*name of plaintiff***] filed this lawsuit in retaliation because [***name of defendant***] had complained about the condition of the property to [[***name of plaintiff***]/[***name of appropriate agency***]]; and**

3. That [*name of plaintiff***] filed this lawsuit within 180 days after**

[*Select the applicable date(s) or event(s):***]**

[the date on which [*name of defendant***], in good faith, gave notice to [***name of plaintiff***] or made an oral complaint to [***name of plaintiff***] regarding the conditions of the property][./; or]**

[the date on which [*name of defendant***], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [***name of appropriate agency***], of which [***name of plaintiff***] had notice, for the purpose of obtaining correction of a condition of the property][./; or]**

[the date of an inspection or a citation, resulting from a complaint to [*name of appropriate agency***] of which [***name of plaintiff***] did not have notice][./; or]**

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property[./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [*name of plaintiff***]].**

[Even if [*name of defendant*] has proved that [*name of plaintiff*] filed this lawsuit with a retaliatory motive, [*name of plaintiff*] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007; Revised June 2010

Directions for Use

This instruction is based solely on Civil Code section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (Civ. Code, § 1942.5(h).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582].) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a "repair and deduct" remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (Civ. Code, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(d) [landlord may proceed "for any lawful cause"]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(e); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595–596 [3 Cal.Rptr.3d 205,

73 P.3d 1185] [landlord asserting lawful cause under 1942.5(d) must also establish good faith under 1942.5(e), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Civil Code section 1942.5(a) provides:

  If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

  (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability.

  (2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability.

  (3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice.

  (4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.

  (5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

- Civil Code section 1942.5(d) provides: "Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy."
- Civil Code section 1942.5(e) provides: "Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or

periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing."

- "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason . . . .' " (*Barela, supra,* 30 Cal.3d at p. 249, internal citations omitted.)
- "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra,* 30 Cal.3d at p. 251.)
- "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)
- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)

- "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)
- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—i.e., a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra*, 31 Cal.4th at p. 596.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 706, 709, 712

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:225

4324. Affirmative Defense—Waiver by Acceptance of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] accepted payment of rent [after the three-day notice period had expired/[***name of defendant***] had violated the [lease/rental agreement]]. To succeed on this defense, [***name of defendant***] must prove:**

[1]. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

[2. That [*name of plaintiff***] failed to provide actual notice to [***name of defendant***] that partial payment would be insufficient to avoid eviction.]**

If [*name of defendant***] has proven that [he/she/it] paid rent, then [he/she/it] has the right to continue occupying the property unless [***name of plaintiff***] proves [one of the following:]**

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/its] right to evict [*name of defendant***][./; or]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008, June 2010

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. This defense is available for breach of a covenant

prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See Civ. Code, § 1954.53(d)(4).)

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- Code Civil Procedure section 1161.1(c), applicable only to commercial real property, provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property."
- Civil Code section 1954.53(d)(4) provides: "Acceptance of rent by the owner does not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or as a waiver of an owner's rights to establish the initial rental rate, unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent."
- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. . . . 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441 [6 P.2d 71], internal citations omitted.)
- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)
- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra,* 153 Cal.App.3d at p. 171, internal citations omitted.)
- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not

a willingness to waive—which would have kept the original lease in force at the contractual rent—but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftmart, Inc., supra,* 123 Cal.App.3d at p. 754.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 669

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31–6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:205